

1 Stephen M. Doniger, Esq. (SBN 179314)
2 stephen@donigerlawfirm.com
3 Scott A. Burroughs, Esq. (SBN 235718)
4 scott@donigerlawfirm.com
5 Regina Y. Yeh, Esq. (SBN 266019)
6 regina@donigerlawfirm.com
7 DONIGER / BURROUGHS APC
8 300 Corporate Pointe, Suite 355
9 Culver City, California 90230
10 Telephone: (310) 590-1820
11 Facsimile: (310) 417-3538

12 Attorneys for Plaintiff

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 BUCKLEY H. CRISPIN, an Individual,

16 Plaintiff,

17 v.

18 CHRISTIAN AUDIGIER, INC., a
19 California Corporation; et al;

20 Defendants.

Case No.: CV09-9509 ABC (JEMx)
The Honorable Audrey B. Collins Presiding

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PARTIAL
SUMMARY JUDGMENT TO
ESTABLISH COPYRIGHT
INFRINGEMENT AND BREACH OF
CONTRACT LIABILITY AGAINST
CHRISTIAN AUDIGIER, INC.;
STEPHEN M. DONIGER, ESQ. IN
SUPPORT THEREOF**

[Declaration of Buckley H. Crispin;
Statement of Uncontroverted Facts and
Conclusions of Law; [Proposed] Order
Filed Concurrently Herewith]

Date: January 10, 2011
Time: 10:00 a.m.
Courtroom: 680

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE that on January 10, 2011 at 10:00 a.m. in Courtroom
4 680 of the above-referenced court, Plaintiff Buckley H. Crispin (“Plaintiff” or
5 “Crispin”) will and hereby does move pursuant to Fed. R. Civ. R. 56 for partial
6 summary judgment to establish liability for copyright infringement against Christian
7 Audigier, Inc. (“Audigier”) on Plaintiff’s First Cause of Action for “Breach of
8 Contract” and his Second Cause of Action for “Copyright Infringement.”
9 Specifically, Plaintiff requests that the Court find that liability against Christian
10 Audigier, Inc. is ripe for adjudication based on the following:

11 1. Buckley H. Crispin orally licensed various works of art to Defendant
12 Audigier for use on of Christian Audigier clothing items. Said works will hereinafter
13 be referred to as “Subject Artwork.”

14 2. Plaintiff and Audigier had an agreement that in the event the Subject
15 Artwork was used commercially on apparel, that Mr. Crispin’s seal would also
16 appear with the work.

17 3. Mr. Crispin was not an employee of Audigier at any point, including
18 when he provided Defendant Audigier with the Subject Artwork. Moreover, he has
19 never provided any written transfer of ownership of the Subject Artwork to Audigier
20 or anyone else. Thus, as a matter of law, no party other than Crispin may claim to be
21 the owner of the Subject Artwork.

22 4. At no point did Mr. Crispin enter into either a written licensing
23 agreement or any other written agreement whatsoever with Audigier, and thus
24 Audigier cannot claim more than a limited, oral, non-exclusive license to the Subject
25 Artwork.

26 5. Despite not owning the Subject Artwork, and having only a limited oral
27 license, Audigier sub-licensed the Subject Artworks to third parties through a number
28 of licensing agreements, and did so without the consent or agreement of Crispin.

1 Specifically, Crispin was never advised regarding, and never consented to, Audigier's
2 sub-licensing of the Subject Artwork for use on the myriad products manufactured
3 and sold by third parties bearing that work, including condoms and sex products,
4 shoes, pet accessories, and so forth. Such unauthorized sublicensing constitutes
5 copyright infringement.

6 6. Plaintiff has come to learn that at least throughout 2009 and 2010
7 Audigier used the Subject Artwork commercially on apparel without Mr. Crispin's
8 seal in breach of its contractual obligations.

9 This motion will be based on these papers, the evidence on file in this action,
10 the Declarations of Buckley H. Crispin and Stephen M. Doniger, and upon such other
11 evidence and argument as may be presented to the Court at the time of hearing.

12 This motion follows the meet and confer efforts of counsel, which took place
13 on November 29, 2010.

14
15 Dated: December 10, 2010

Respectfully submitted,
DONIGER / BURROUGHS APC

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18 By: /s/ Stephen M. Doniger
19 Stephen M. Doniger, Esq.
20 Attorney for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff Buckley H. Crispin (“Plaintiff” or “Crispin”) is a highly-respected, award-winning tattoo artist. In the 2004 “Best Of” edition of the OC Weekly, Mr. Crispin was named “Best Tattoo Artist” while working at Goodtime Charlie’s Tattooland in Anaheim, CA – the tattoo parlor formerly owned by tattoo legend Ed Hardy. (Crispin Decl. ¶ 1.) He also sells clothing bearing his artwork through a number of online stores including Mood Swings (www.moodswingsonthenet.com) and Black Market Art Co. (www.blackmarketartcompany.com). (Crispin Decl. ¶ 2.)

Between November of 2005 and January of 2006 Mr. Crispin created a number of works of tattoo-styled art which he offered to Audigier for use on certain apparel items. (Crispin Decl. ¶ 3). Christian Audigier himself reviewed the artwork presented, selected the ones he wanted to license, and rejected others. (Crispin Decl. ¶ 3).

For each work of art selected for use, Audigier agreed to pay Crispin \$1,100 with no further royalty or payments due. (Crispin Decl. ¶ 4). Plaintiff and Audigier also agreed that Audigier would use Crispin’s seal – a small logo – whenever the Subject Artwork was used commercially. (Crispin Decl. ¶ 4; Nisenbaum Dep. 34:7-22, 77:17-78:1 [Doniger Decl., ¶1, Ex. 1]).

Over the course of their relationship Audigier licensed 12 works of art from Crispin for use on “Christian Audigier” items.. Among those works are some of the most popular in the Audigier library, including the “Tiger with Roses,” “Black Panther,” Mr. Crispin’s “Eagle,” and a number of unique skull designs. (Crispin Decl. ¶ 5).

Crispin was never an employee of Audigier. (Crispin Decl. ¶ 6). Moreover, there was never any work-for-hire agreement, written transfer of ownership, or any other written agreement concerning those works. (Crispin Decl. ¶7).

After receiving the Subject Artwork, Audigier entered into approximately 30

1 licensing agreements pursuant to which its licensees manufactured and sold a wide
2 range of products bearing works from the Subject Artwork. (Doniger Decl. ¶2).
3 These products included condoms and sex products, shoes, pet accessories, and many
4 others. (Crispin Decl. ¶10, Exhibits 5-11).

5 Audigier never sought or received the consent of Crispin to sub-license the
6 Subject Artworks. (Crispin Decl. ¶ 11; Nisenbaum Dep. 85:9-87:17 [Doniger Decl.
7 ¶1]). In fact, Audigier had no recollection of ever speaking with Plaintiff about any
8 Audigier licensees and admits that he never identified any specific licensees to Mr.
9 Crispin. (Audigier Dep. 27:6-10; 32:24-37:10; 39:16-25; 42:16-43:3; 44:7-13; 46:11-
10 18 [Doniger Decl. ¶3]). Doniger Decl. ¶2).

11 In 2009 Plaintiff learned that certain garments manufactured and sold by
12 Audigier which bore his artwork did not use his signature seal. Worse, he learned
13 that in certain cases his artwork was being used with the seal of another artist.
14 (Crispin Decl. ¶9, Ex. 3-4)

15 In sub-licensing Crispin's artwork to third parties without Crispin's express
16 consent, Audigier violated Crispin's copyrights in his proprietary designs. In failing
17 to affix Crispin's signature seal to each use of Crispin's artwork, Audigier violated its
18 contract with Crispin. Both issues are ripe for adjudication, and Crispin respectfully
19 requests that this Motion be granted.

20
21 **II. PARTIAL SUMMARY JUDGMENT IS PROPER BECAUSE NO**
22 **TRIABLE ISSUE EXISTS AS TO DEFENDANT'S LIABILITY FOR**
23 **EITHER BREACH OF CONTRACT OR COPYRIGHT**
24 **INFRINGEMENT.**

25 **A. The Summary Adjudication Standard**

26 Summary judgment should be granted if the evidence, when viewed in the light
27 most favorable to the non-moving party, shows there is no genuine issue of material
28 fact. Fed. R. Civ. P. 56(c)(2); *Tarin v. County of Los Angeles*, 123 F. 3d 1259, 1263

(9th Cir. 1997). Additionally, a Court may also summarily adjudicate questions of fact and liability. Fed. R. Civ. P. 56(d). For such adjudication, the moving party must show that there is no genuine issue of material fact as to a particular claim. *Wang Laboratories, Inc. v. Mitsubishi Electronics, America, Inc.*, 860 F. Supp. 1448, 1450 (C.D. Cal. 1993) (citations omitted). Upon this showing, the Defendant must provide specific facts that indicate a dispute as to a material issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). This showing must be substantive—a “scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact.” *Addisu*, 198 F.3d at 1134 (citing *United Steel Workers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989)).

Audigier’s liability for copyright infringement is ripe for adjudication given the undisputed evidence that there was no written agreement between the Plaintiff and Audigier, and no consent obtained by Audigier to sublicense Plaintiff’s work. As a matter of law, that conduct constitutes copyright infringement. Similarly, the parties admit that a condition of Audigier’s use of the artwork on shirts was that Crispin’s logo was to be used, yet it is beyond dispute that Audigier sold apparel bearing Plaintiff’s artwork without his logo.

B. Audigier Infringed Mr. Crispin’s Copyrights By Sub-Licensing His Artwork to Third Parties Without his Consent.

There is simply no triable issue of fact as to Audigier’s liability for copyright infringement since it brought in substantial revenue from the unauthorized sublicensing of Mr. Crispin’s artwork. Mr. Crispin created a dozen works of art that he licensed to Audigier for use on certain clothing items. While Audigier may have paid for and received a license to use that artwork, it cannot claim to own the Subject Artwork since there was never an executed writing transferring the works as required by 17 U.S.C. § 204(a). Furthermore, Audigier never sought nor received Mr. Crispin’s permission to sublicense that artwork, thus committing copyright

1 infringement as a matter of law.

2 It is statutorily recognized that a transfer of copyright ownership or a grant of
3 an exclusive license *must* be in writing to be valid. Copyright Act of 1976, 17 U.S.C.
4 § 204 (a). Thus without a written agreement, the recipient of a copyrightable work
5 cannot claim either ownership or an exclusive license to that work. However,
6 Section 204 of the Copyright Act of 1976 explicitly excludes non-exclusive licenses.
7 Copyright Act of 1976, 17 U.S.C. § 204 (a). It follows, by “negative implication”
8 that a *non-exclusive* license may be granted *orally*. Melville B. Nimmer & David
9 Nimmer, *Nimmer on Copyright* §10.03[A][7] (2001); *Effects Assoc., Inc. v. Cohen*,
10 908 F.2d 555, 558 (9th Cir. 1990).

11 In this case, there is no written agreement. Thus Audigier can claim nothing
12 more than a *non-exclusive* oral license to the Subject Artwork.

13 Moreover, it is settled law in this Circuit that a valid sub-license can only be
14 made upon **express** permission from the copyright owner. *See* 17 U.S.C. §
15 201(d)(2); *Gardner v. Nike Inc.*, 279 F.3d 774, 781 (9th Cir. 2002) (“an exclusive
16 licensee has the burden of obtaining the licensor's consent before it may assign its
17 rights, absent explicit contractual language to the contrary.”). This rule follows from
18 the purpose underlying federal copyright law — protecting an artist’s rights in his or
19 her creative expression. *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th
20 Cir. 1988) (citing, *inter alia*, *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30,
21 36 (1939)); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088, (9th Cir. 1989). In fact,
22 it is recognized that the purposes of copyright law — protecting copyright owner’s
23 rights — would be frustrated if licenses were broadly construed. *Cohen*, 845 F.2d at
24 854.

25 Towards that end, licenses are to be construed narrowly. *Apple Computer, Inc.*
26 *v. Microsoft Corp.*, 759 F. Supp. 1444, 1451 (9th Cir. 1994) (narrow interpretation
27 promotes federal policy of “providing incentives in the form of copyright protection
28 of authors.”). The construction of the license must ensure that “valuable [and]

1 enforceable rights” are reserved to the authors of original works so as to encourage
2 production of works that will benefit the world. *Cohen*, 845 F.2d at 854 (quoting
3 *Washingtonian*, 306 U.S. at 36).

4 This Circuit has clearly held that licensing agreements “are assumed to prohibit
5 any use *not* authorized.” *S.O.S., Inc.*, 886 F.2d at 1088 (citing, *inter alia*, *Cohen*, 845
6 F.2d at 853) (emphasis added); *see also Beckman Instruments, Inc. v. Cincom*
7 *Systems, Inc.*, 2000 U.S. App. LEXIS 18166 at *5 (9th Cir. 2000) (unpublished)
8 (citing *S.O.S., Inc.*, 886 F.2d at 1088)(“We have rejected the argument that license
9 agreements permit that which they do not prohibit”).

10 Audigier’s exploitation of the Subject Artwork was limited to use made
11 directly by the company on a limited universe of item that bore his signature seal.
12 Despite these limitations, Audigier exploited the Subject Artwork on a dizzying array
13 of items, sub-licensed the Subject Artwork for third-party use, and failed to affix
14 Crispin’s signature seal to a material number of products. It is clear the scope of the
15 license was exceeded, and it is black letter law that any use by Audigier in excess of
16 the scope of its license is unlawful and constitute copyright infringement. *See S.O.S.,*
17 *Inc.*, 886 F.2d at 1087 (“A licensee infringes the owner's copyright if its use exceeds
18 the scope of its license.”); *see also IAE, Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir.
19 1996) (“The licensee violates the copyright by exceeding the scope of this license.”).

20 Because Crispin was never even advised that his art was to be used on sex
21 products, dog accessories, watches, motorcycle helmets, air fresheners, perfume,
22 sunglasses, jewelry, swimwear, wine bottles, etc... (let alone asked for his
23 permission) he - like the plaintiff in *Gardner* - was given “no role in determining
24 whether [each of Audigier’s licensees] would be an appropriate sublicensee.”
25 *Gardner*, 279 F3d at 781. As such, there can be no question that Audigier engaged in
26 improper sub-licensing in violation of Plaintiff’s copyright. Therefore, this motion
27 should be granted.

1 **C. Audigier Breached Its Contract With Plaintiff By Failing To Use**
2 **Plaintiff's Seal With Each Use of His Artwork.**

3 There is no question that Audigier agreed to use Mr. Crispin's seal whenever it
4 used the Subject Artwork commercially on apparel. There is also no question that, at
5 least in and through 2009, Audigier not only failed to do so, but on many occasions
6 included the logo of a different artist next to Mr. Crispin's work – thus creating the
7 appearance that another artist was responsible for that work. In so doing, Audigier
8 breached its agreement with Plaintiff and deprived Plaintiff of the benefits of his
9 bargain. While damages for Audigier's breach may be subject to dispute, the fact of
10 the breach is not. Therefore, this motion should be granted.

11 In order to prevail on his claim for Breach of Contract Plaintiff must show 1)
12 the existence of a contract, (2) plaintiff's performance or excuse for non-performance,
13 (3) defendant's breach, and (4) damages to plaintiff therefrom. *Acoustics, Inc. v.*
14 *Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].

15 Audigier's contractual obligation to use Mr. Crispin's seal on all apparel which
16 includes his artwork is undisputed. When David Nisenbaum, Audigier's COO and
17 CFO offered a written agreement to Plaintiff, that draft stated "*Audigier agrees that*
18 *in the event that the Artwork is used for a commercial purpose on apparel then it will*
19 *be in conjunction with the seal of Artist.*" In his deposition Mr. Nisenbaum
20 unequivocally confirmed that Audigier and Crispin agreed that the seal would be
21 used in connection with any commercial uses of the Subject Artwork.

22 Next, there can be no question that Plaintiff fully performed since his only
23 obligation was to provide certain works to Audigier for its use. Similarly, there can
24 be no real question that Audigier has breached the agreement since Plaintiff has seen
25 garments bearing his artwork but without his logo – and in many cases even seen
26 garments with his artwork and the logo of another artist. While the scope of
27 Audigier's breach is still being uncovered through ongoing discovery, the fact that
28 Audigier has been using Plaintiff's artwork on apparel without Plaintiff's seal is not

1 subject to reasonable dispute.

2 Finally, while the parties may argue over the damages that have been incurred
3 by Plaintiff as a result of the loss of advertising and promotional benefits that he
4 otherwise would have received from the consistent use of his seal, the fact of
5 damages is sufficiently certain. See e.g., *Popovich v. Sony Music Entm't, Inc.* 508
6 F.3d 348, 353 (6th Cir. 2007) (finding the value of the international publicity lost
7 when a logo was not affixed to a record was \$5.6 million). Therefore, Plaintiff's
8 claim of liability for breach of contract with regard to the use of his seal is subject to
9 summary judgment and this motion should be granted.

11 III. CONCLUSION

12 For the foregoing reasons, Plaintiff respectfully requests that this Court grant
13 this motion and find, in whole or in part, the following:

- 14 1. Crispin holds a valid copyright for the Subject Artwork.
- 15 2. Audigier is liable for copyright infringement because it sub-licensed the
16 Subject Artwork to third parties without Crispin's express consent.
- 17 3. Audigier breached its contract with Crispin by failing to include Crispin's seal
18 with each commercial use of the Subject Artwork.

19 Respectfully Submitted,

20 Dated: December 13, 2010

DONIGER/BURROUGHS APC

22 By: /S/ Stephen M. Doniger
23 Stephen M. Doniger, Esq.
24 Attorneys for Plaintiff

DECLARATION OF STEPHEN M. DONIGER

I, STEPHEN M. DONIGER, am above eighteen years of age, and an attorney at the Doniger/ Burroughs APC, counsel for Plaintiff Buckley H. Crispin. I have personal knowledge of the matters set forth herein, and if called as a witness, could and would competently testify hereto.

1. On November 11, 2010 I took the deposition of David Nisenbaum in this case. Mr. Nisenbaum testified that he was the Chief Operating Officer and Chief Financial Officer of Christian Audigier, Inc. in 2005 and 2006 and was the individual who, along with Mr. Christian Audigier, reached an agreement with Mr. Crispin to use his artwork. Attached hereto as Exhibit "1" is a true and correct copy of relevant pages of Mr. Nisenbaum's deposition.
2. Through discovery in this case Plaintiff has learned that Christian Audigier, Inc. has entered into approximately 30 different licensing agreements pursuant to which it provided artwork, including Plaintiff Crispin's artwork, to third parties for use on a wide range of apparel and non-apparel products. If this fact is disputed Plaintiff will file those license agreements under seal with the Court, but Plaintiff's understanding is that this fact is not disputed.
3. On November 18, 2010, I took the deposition of Christian Audigier in this case. Attached hereto as Exhibit "2" is a true and correct copy of relevant pages of that deposition.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed December 13, 2010 at Culver City, California

/s/ Stephen M. Doniger
Stephen M. Doniger, Esq.